UNITED STATES OF AMERICA
Before the
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

In the Matter of	
LAWRENCE A. SWANSON, JR. Former Director and Chief Executive Officer of	Re: Case No. OTS AP ATL-93-7
FIDELITY FEDERAL SAVINGS BANK, a Federal Savings Bank, Dalton, Georgia	OTS Order No. AP 95-05 Dated: January 24, 1995

DECISION AND ORDER

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

Until his forced resignation in May 1991, Lawrence A. Swanson ("Swanson" or "Respondent") was the Chief Executive Officer and a Director at Fidelity Federal Savings Bank, a Federal Savings Bank of Dalton, Georgia ("Fidelity" or the "Association"). This administrative proceeding involves a complicated series of violations by Respondent that appear to have been designed to conceal personal assets from his ex-wife and a state divorce court. Among other things, Swanson caused Fidelity's reports to understate his beneficial stock ownership, manipulated Fidelity's management bonus system and financial records to conceal $118,000 in bonuses, and misled OTS examiners regarding the accuracy of the Association's books and records.

In other wrongful transactions, Respondent violated the mutual-to-stock conversion regulations, conditions imposed in connection with Fidelity's conversion application, the Change of Control Act, and agency regulations implementing the Control Act.

The Acting Director finds that Respondent's conduct justifies the issuance of a cease and desist order for all violations, and Civil Money Penalties ("CMPs") of $30,548.44 for the Control Act violations. Although the legal standards for a prohibition order have been met for some of the charges against Swanson, the Acting Director, as an exercise of his discretion, declines to issue a prohibition order in this particular case.

II. BACKGROUND

A. Summary of the Administrative Proceedings[1]

On January 25, 1993, the Southeast Regional Office of the OTS ("Enforcement") issued a Notice of Charges and Hearing for an Order to Cease and Desist for Affirmative Relief, Notice of Intention to Prohibit and Notice of Assessment of Civil Money Penalties (the "Notice"). The Notice alleged that Swanson violated regulations and statutes, violated a condition imposed in writing by the agency in connection with the granting of an application, engaged in unsafe and unsound practices in conducting the affairs of Fidelity, and violated his fiduciary duties to Fidelity. The Notice sought a cease and desist order requiring Respondent to pay restitution of $118,000 and OTS investigation and litigation costs; an industry-wide prohibition order; and CMPs of $112,073.

Swanson timely filed an answer. An oral hearing was held in Atlanta, Georgia on October 12-14, 1993, before Administrative Law Judge Arthur L. Shipe (the "ALJ"). Although Swanson had previously been represented by counsel, he appeared at the hearing pro se. Respondent and Enforcement timely filed post-hearing submissions on December 21, 1993, and replies on January 6 and 7, 1994. On February 14, 1994, new counsel for Respondent sought permission to supplement Respondent's post-hearing brief. The ALJ granted the motion by order issued February 17, 1994. Respondent filed supplemental post-hearing pleadings on March 8, 1994, and

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[1] Citations to various documents are as follows: Tr. refers to the hearing transcript; OTS Ex. __, R. Ex. __, and Jt. Ex. __ refer to Enforcement, Respondent or Joint exhibits admitted into evidence at the hearing; and RD refers to the Recommended Decision.

Enforcement responded on March 22, 1994.

The ALJ issued a Recommended Decision on May 23, 1994, including Findings of Fact, Conclusions of Law, and a Proposed Order ("Recommended Decision"). On June 23, 1994, Enforcement and Respondent filed exceptions to the Recommended Decision. Enforcement replied to Respondent's exceptions on July 11, 1994. On October 26, 1994, the parties were notified that the Recommended Decision was submitted for the Director's review and final determination. 12 C.F.R. § 509.40(a)(1994).

B. Summary of the Facts[2]

Swanson joined Fidelity as Chairman of the Board of Directors, in March 1983 and held this position until Fidelity converted its charter from mutual to stock form on October 14, 1983. Thereafter until May 6, 1991, Swanson was the Chief Executive Officer and a Director of Fidelity.

1. Conversion Regulation Violations 1983-1986

Following Fidelity's mutual-to-stock conversion, Swanson

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[2] The Acting Director generally accepts the facts relied on by the ALJ in his Recommended Decision. The record, however, also reflects numerous instances where additional facts are relevant to the determination of this action. These facts are included in the discussion of facts with appropriate citations to supporting evidence in the record.

In addition, the ALJ made findings that examinations of Fidelity conducted prior to 1991 were generally favorable, that Fidelity did not attract regulatory concern until 1991, and that supervisory criticisms of lending practices contained in the 1991 examination were unfounded. See RD at 5-6. These findings are not supported by evidence and are rejected.

purchased Fidelity stock in violation of applicable regulations and conditions imposed in writing by the Federal Home Loan Bank Board ("FHLBB") in connection with the conversion application.

Fidelity's plan of conversion, approved by the FHLBB and consummated on October 14, 1983, included a limitation prohibiting officers and directors from purchasing Fidelity stock for three years after the conversion without the prior written approval of the FHLBB. Negotiated transactions involving more than one per cent of the outstanding capital stock and purchases from a broker or dealer registered with the Securities Exchange Commission ("SEC") were excepted.[3]

Fidelity originally issued 96,600 shares of common stock. Swanson acquired 2,720 shares or 2.8 percent of the initial offering. Shortly after the initial offering, Fidelity issued an additional 2,000 shares which reduced Swanson's interest to 2.75 percent.

In the three years following the conversion, Swanson and other officers and directors purchased additional stock without the approval from the FHLBB on five occasions.[4] These purchases included:

> 200 shares from L. Hugh Kemp for $13.94 per share on December 27, 1984. Kemp sold a total of 400 shares (0.4 percent of Fidelity's outstanding shares) in this

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[3] 12 C.F.R. § 563b.3(c)(9)(1983), as amended at 48 Fed. Reg. 15601 (Apr. 12, 1983).

[4] Enforcement does not allege that a sixth transaction, Swanson's purchase of 2,340 shares from Wyatt Mullinax on April 3, 1986, violated the conversion regulations.

transaction. John McDonald, a Vice President of Fidelity, purchased the other 200 shares.

960 shares from Rodney H. Roberts for $18.00 per share on March 20, 1985. Roberts sold a total of 1,920 shares (1.94 percent of the outstanding shares) in this transaction. McDonald purchased the other 960 shares.

100 shares from Paul Havlin for $18.00 per share on March 27, 1985. Havlin transferred a total of 1,000 shares (1.01 percent of the outstanding shares) in this transaction. McDonald also purchased 100 of the shares.

195 shares from Juanita Swanson for $15.50 per share on March 27, 1985. Juanita Swanson sold a total of 390 shares (0.39 percent of the outstanding shares) in this transaction. McDonald purchased the other 195 shares.

200 shares from Bobby E. Pickrell for $32.00 per share on October 21, 1985. Pickrell sold a total of 1,000 shares (1.01 percent of the outstanding shares) in this transaction. McDonald also purchased 200 of these shares.[5]

An account executive of an SEC-registered broker, J.C. Bradford, assisted shareholders in the Roberts, Havlin, Juanita Swanson and Pickrell transactions.[6] In each of these cases, J.C. Bradford transmitted the seller's stock certificates to Fidelity for reissuance in the purchasers' names. J.C. Bradford did not act as a market maker for Fidelity stock, did not set prices for Fidelity stock, did not purchase or sell shares of Fidelity stock during the relevant time period, played no role in the negotiation of the purchases and received no commissions on the transactions.[7] None of the sellers were SEC-registered brokers or dealers.

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[5] In each transaction all purchasers paid the same price for the shares. McDonald Tr. at 324-31.

[6] J.C. Bradford had no involvement in the Kemp transaction.

[7] RD at 47-48; Tr. Parker at 214-215.

2. Control Violations 1986-1991

From at least April 18, 1986, through May 1991, Swanson acted in concert with John McDonald, a Vice President and Director of Fidelity, to acquire and hold over 10 percent of the outstanding shares of Fidelity in violation of the Change of Control Act and applicable regulations. To conceal Swanson's stock ownership from his ex-wife in pending divorce proceedings, McDonald held Swanson's 1986-1989 stock acquisitions as a nominee for Swanson. As a result of Swanson's concealment of ownership, Fidelity's proxy statements in 1987-89, a 1987 stock offering circular and a 1991 management questionnaire understated Swanson's beneficial holdings of Fidelity stock.[8]

Shortly after the conversion, Respondent and McDonald entered into a stock purchase and sale agreement. This agreement, dated October 23, 1983, granted Swanson and McDonald the right of first refusal of the Fidelity stock that the other party might acquire. The agreement stated that if their shares were to pass to outside purchasers, it "would tend to disrupt the harmonious and successful management and control of the corporation."[9]

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[8] The ALJ concluded that Swanson may be held liable under 12 U.S.C. § 1818 for these deficiencies in the institution's books and records, and the Acting Director believes that the record evidence supports this conclusion.

[9] On or about March 1983, Swanson recruited John McDonald to serve as a Fidelity officer. To entice McDonald to leave stable employment at another depository institution in Georgia, Swanson and McDonald executed an additional written agreement whereby Swanson personally guaranteed that McDonald would receive a minimum level of compensation for five years. McDonald became a Vice President of Fidelity in March 1983 and was elected to the Board of Directors in 1988. Tr. McDonald at 302-03.

Thereafter until April 18, 1986, Respondent and McDonald made periodic purchases of stock, often in parallel action where each would purchase equal or near equal amounts of stock from the same individual on the same date.[10] Swanson's and McDonald's aggregated stock holdings first exceeded 10 percent of the outstanding Fidelity stock on March 20, 1985.

On April 18, 1986, McDonald and Swanson altered their method of acquiring Fidelity stock. During the next three and one-half years, until December 14, 1989, McDonald made ten purchases of 7,445 shares of Fidelity stock for himself and Swanson. In each case, McDonald instructed Fidelity to issue two stock certificates equal or approximately equal to one half of the total amount of the purchase. While both certificates were registered in McDonald's name on Fidelity's stock register, McDonald endorsed one certificate for each transaction and delivered that certificate to Swanson.[11] As a result, Fidelity's stock register did not indicate that Swanson had a beneficial interest in many of the shares registered in McDonald's name. This process enabled Swanson to conceal his stock ownership from his ex-wife and the state divorce court.

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[10] These parallel transactions are described above in connection with the conversion regulation violations.

[11] Swanson's interest in these purchases included: 200 shares from Roger Williams (4/18/86); 133 shares from Vernon Hawkins (2/19/87); 267 shares from L. Hugh Kemp, P.C. (2/19/87); 725 shares from Ralph Green (11/27/87); 147 shares from Lori Taylor (4/7/88); 467 shares from Jance R. Spence (5/2/88); 200 shares from Maurice Sponcler (5/2/88); 83 shares from Jim T. Griffin (6/16/88); 1000 shares from Donald R. Thomas (7/10/88); and 500 shares from Billy Holcomb (12/14/89). These figures represent raw numbers of shares and do not take into account the effect of Fidelity stock splits made during this period.

In addition to their stock purchasing plan, Swanson and McDonald borrowed money jointly, extended credit to each other, and otherwise assisted each other in financing certain purchases. Their assistance to each other included:

> McDonald obtained a personal $12,000 loan from Fidelity on January 14, 1987. The proceeds were used to purchase 400 Fidelity shares on February 19, 1987, from Vernon Hawkins for Swanson, McDonald and others. Swanson approved the loan, although another officer processed the loan documents.
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> On February 19, 1987, McDonald purchased 800 Fidelity shares from Hugh Kemp for McDonald, Swanson and others. McDonald paid the entire purchase price and thus advanced funds and provided credit for the shares purchased on Swanson's behalf.
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> On June 15, 1988, Swanson paid $20,000 by personal check to Maurice Sponcler to acquire 400 shares for Swanson and McDonald. Swanson thus advanced $10,000 and provided credit for the shares purchased on McDonald's behalf.
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> On July 7, 1989, Swanson and McDonald jointly borrowed $50,000 from Northwest Georgia Bank. These funds were used to purchase Fidelity stock for Swanson and McDonald from Donald Thomas.

Swanson's and McDonald's individual stock holdings never exceeded ten percent of the outstanding Fidelity stock. However, from March 20, 1985, until Swanson's resignation on May 6, 1991, Swanson's and McDonald's aggregated holdings exceeded 10 percent. At the highest point, Swanson and McDonald held 16.39 percent.[12] Neither Swanson nor McDonald filed a change of control notice, rebuttal of control, or otherwise notified FHLBB or OTS or received their approval of stock acquisitions during the relevant time period.

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[12] Swanson's and McDonald's stock holdings are summarized in Appendix A (OTS Ex. 23).

Swanson's efforts to conceal his ownership of stock from his ex-wife and the divorce court resulted in the falsification of a number of bank records. Specifically, Fidelity's 1987-89 proxy statements, its 1987 stock offering circular, and a 1991 management questionnaire all reflected the registration of Swanson's stock in McDonald's name and did not reflect the magnitude of Swanson's beneficial ownership of stock or McDonald's nominee status.[13]

3. Improper Bonus - 1990

In 1990, Swanson received $118,000 in bonuses from Fidelity that were not recorded on the Association's books. Instead of receiving the entire bonus directly from the Association, Swanson directed Fidelity to overpay a bonus to McDonald by $118,000, and, by prior agreement between McDonald and Swanson, McDonald then paid the $118,000 to Swanson. Fidelity's records incorporated these misrepresentations of the amounts of bonuses paid to officers. Subsequently, Swanson misled an OTS examiner regarding the amount of the bonus that he received. As a result of the transaction, Swanson was able to conceal income from his ex-wife.

On December 11, 1984, Fidelity's Board of Directors adopted a bonus plan for its officers, including Swanson and McDonald. Under this program, officers were paid bonuses from a pool equal to ten percent of Fidelity's pre-tax net profit (less loan loss reserves).

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[13] The trial for Swanson's divorce occurred in February 1989. Tr. McDonald at 395, 422-23. Following the divorce, Swanson's ex-wife initiated a lawsuit charging Fidelity with violations of the Racketeer Influenced Corrupt Organizations Act ("RICO Act") based on Swanson's stock concealment. Fidelity incurred legal expenses in an unspecified amount to defend this action.

The bonus was intended as an incentive for hard work and a reward for profitable results. Swanson, as the Chief Executive Officer, was responsible for determining and distributing bonuses.

Fidelity's books and records faithfully record the decisions that Swanson announced for 1989 bonuses. These records reflect that Swanson received $22,000 and McDonald received $228,000 as 1989 bonuses in 1990. In reality, however, Swanson and McDonald agreed that McDonald would retain only $110,000 of his $228,000 bonus and would pay the remaining $118,000 to Swanson. Following the bonus payment, McDonald purchased, endorsed and delivered three cashier's checks totalling $118,000 to Swanson. Swanson used the checks to repay loans owed to various institutions.[14]

During a 1991 examination of Fidelity, the OTS examiner asked Swanson to explain why his 1989 bonus was significantly less, and McDonald's bonus significantly more, than in 1988.[15] By letter dated April 5, 1991, Swanson stated that he had not contributed as significantly to Fidelity's overall performance. He failed to report, however, that in fact he had received $140,000 rather than $22,000 from the bonus pool.[16]

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[14] McDonald reported and paid all 1990 Federal and State income taxes on the $118,000. Respondent repaid McDonald for this increased tax liability, but did not report the $118,000 bonus on his own 1990 income tax.

[15] In 1989, Swanson received $150,000 and McDonald received $120,000 in bonuses for 1988. OTS Ex. 33 at 19 (Fidelity Report of Examination).

[16] Swanson stated: "In 1989 as well as a period in 1988, the writer was out of the office more time than normal which resulted in his being able to work only perhaps eight to ten hours per day. As a result, the writer did not contribute as much to the overall performance of Fidelity Savings Bank as he had in the past relative to other people." OTS Ex. 32.

C. The ALJ's Recommended Decision

The ALJ found that Respondent violated: the mutual-to-stock conversion regulations at 12 C.F.R. § 563b.3(c)(9) and conditions imposed in writing under Fidelity's approved plan of conversion; the Control Act at 12 U.S.C. § 1817(j) and 12 U.S.C. § 1730(q) and the Control Regulations at 12 C.F.R. Part 574; FHLBB and OTS regulations governing accurate recordkeeping at 12 C.F.R. § 563.17-1 and 12 C.F.R. 563.170(c); and OTS regulations prohibiting misleading statements to examiners at 12 C.F.R. § 563.180(b)(1). The ALJ also found that Swanson violated his fiduciary duties to the institution and engaged in unsafe and unsound banking practices.

Based on these conclusions, the ALJ recommended the issuance of cease and desist and prohibition orders and the imposition of CMPs of $42,000. The ALJ recommended denial of the requested affirmative actions of divestment of Fidelity stock, restitution of the $118,000 bonus, and restitution of Enforcement's litigation and investigation costs.

III. DISCUSSION[17]

A. Cease and Desist and Prohibition Orders

1. Standards Governing the Issuance of Cease and Desist and Prohibition Orders

The conduct at issue in this proceeding occurred both before and after August 9, 1989, the date of enactment of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). Under 12 U.S.C. § 1818(b), as amended by FIRREA, the OTS may issue a cease and desist order against an institution-affiliated party who, inter alia, engaged in an unsafe or unsound practice in conducting the business of an institution,[18] or

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[17] Exceptions of the parties that are not specifically addressed in this Decision are denied. Respondent raises numerous general exceptions to the ALJ's Recommended Decision that fail to identify clearly the issues for review. These general objections will not be considered or addressed in this Decision. See In re Simpson, OTS Order No. AP 92-123, 15, n.14 (Nov. 18, 1992), order affirmed, Simpson v. OTS, 29 F.3d 1418 (9th Cir. 1994), petition for cert. filed, Nov. 23, 1994.

[18] The OTS has defined an unsafe and unsound practice as conduct that is contrary to generally accepted standards of prudent operation of a financial institution, the normal consequences of which, if continued, may be abnormal risk, or loss or damage to an institution, its shareholders, or the Federal deposit insurance fund. See In re Keating, OTS Order No. AP 93-85, 34-35 (Oct. 22, 1993), aff'd, Keating v. OTS, No. 93-70902, slip op. (9th Cir. Jan. 18, 1995).

The ALJ summarily concluded that Respondent's regulatory and statutory violations and fiduciary breaches constituted unsafe and unsound practices. RD at 39, 61. The Recommended Decision, however, does not make findings regarding the abnormal risk, or loss or damage resulting from Respondent's actions. While the same act simultaneously may be a violation of regulations, statutes, or fiduciary duties, and an unsafe and unsound practice, one is not necessarily a proxy for the other. The Acting Director does not attempt to sort out which violations are unsafe and unsound and which are not, since the counts at issue can be disposed of by reference to regulation, statute, or the principles of fiduciary duty.

violated a law, rule or regulation, conditions imposed in writing or written agreements with the agency. The standards supporting the issuance of cease and desist orders are essentially the same for pre- and post-FIRREA conduct.[19] Provided that certain statutory predicates are satisfied, the agency not only may require a party to cease and desist from the violation or practice but also may take various affirmative actions to correct the conditions resulting from the violation or practice.[20]

Under the post-FIRREA statute, the OTS is authorized to issue an industry-wide prohibition order in situations where a respondent's conduct meets a three-pronged statutory test: (1) the respondent has violated a law, a regulation, a final cease and desist order, a condition imposed in writing by the agency or a written agreement with the agency, has engaged in an unsafe or unsound practice, or has breached fiduciary duties; (2) as a result of this misconduct, the institution has suffered or will probably suffer financial loss or other damage, the interests of the depositors have been or could be prejudiced, or the respondent received financial gain or other benefit; and (3) the violation, practice or breach involves personal dishonesty, or demonstrates willful or continuing disregard for the safety or soundness of the institution.[21]

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[19] Compare 12 U.S.C. § 1818(b)(Supp. II 1990) with 12 U.S.C. § 1464(d)(2)(1982 & 1988).

[20] 12 U.S.C. § 1818(b)(1) and (6)(Supp II. 1990) and 12 U.S.C. § 1464(d)(2)(1982 & 1988).

[21] The statutory standard for issuing a prohibition order differs for pre-FIRREA conduct. Compare 12 U.S.C. § 1818(e)(1)(Supp. II 1990) with 12 U.S.C. § 1464(d)(4)(1982 & 1988). These differences, however, are not relevant to today's final decision. FIRREA's expanded remedy of an industry-wide prohibition may be

The allegations against Swanson under the statutory standards for cease and desist and prohibition orders are discussed below.[22]

2. Application of Standards

a. Conversion Regulation Violations

The ALJ recommended the issuance of a cease and desist order against Swanson[23] based on five violations of the mutual-to-stock conversion regulations and related conditions imposed in writing in Fidelity's conversion plan. Although the Acting Director adopts the ALJ's recommendation for the issuance of a cease and desist order, the order will be based on two violations.

Under 12 C.F.R. § 563b.3(c)(9)(1983), as amended at 48 Fed. Reg. 15601 (Apr. 12, 1983), each plan of conversion must:

> Provide that no officer or director . . . shall purchase, without the prior written approval of the Corporation, the capital stock of the converted insured institution except from a broker or dealer registered with the Securities and Exchange

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imposed for conduct occurring pre- or post-FIRREA. 12 U.S.C. § 1818(e)(7)(A)(Supp. V 1993). In re Keating at 26; In re Simpson at 34, n.31; In re Lopez, OTS Order No. AP 92-33, 30-31 (Apr. 15, 1992); and In re O'Keeffe, OTS Order No. 90-661, 13-15 (Apr. 26, 1990).

[22] The ALJ jointly analyzed all violations under the prohibition criteria. The Acting Director believes that 12 U.S.C. § 1818(e)(1) in this case requires each set of violations to be analyzed separately.

[23] As Chief Executive Officer and a Director of Fidelity, Swanson was an institution-affiliated party under 12 U.S.C. § 1813(u)(Supp. II 1990), and was a director, officer, employee, agent or other person participating in the conduct of the affairs of Fidelity under 12 U.S.C. § 1464(d)(2)(A) and (d)(4)(A) (1982 & 1988).

> Commission, for a period of three years following the conversion. This paragraph (c)(9) shall not apply to negotiated transactions involving more than one percent of the outstanding capital stock of the converted institution.

Respondent argues that three of the five disputed transactions (i.e., the Roberts, Havlin and Pickrell purchases) fell within the one percent negotiated sale exception and do not support the issuance of a cease and desist order. In each of the three transactions, Respondent was one of several individuals purchasing from an existing stockholder at an identical price as part of one transaction. While the number of shares purchased by Respondent in each transaction was below the one percent limitation, the total number of shares transferred by each seller to the multiple purchasers in each of the transactions exceeded one percent of the outstanding stock of Fidelity. The ALJ determined that the exception was inapplicable because Respondent individually did not purchase more than one percent of the outstanding shares.

As explained when the OTS applied the same insider limitation to purchasers in mutual-to-stock conversions involving mutual holding companies, the purpose of the three-year prohibition is to protect the integrity of the stock conversion process by preventing insiders and their associates from using or appearing to use their superior knowledge to turn a quick profit by repurchasing shares from other shareholders shortly after the conversion.[24] Rather than ban all insider purchases, however, the rule presumes that holders of large blocks of the institution's stock have sufficient

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[24] See 56 F.R. 1126, 1132 (Jan. 11, 1991)(explanation of restriction in Mutual Holding Companies regulation); 43 Fed. Reg. 48956 (Oct. 19, 1978)(Notice of Proposed Rulemaking - Mutual to Stock Conversion Regulation).

business acumen to be aware of the value of their holdings and to protect themselves in transactions involving the stock, and permits insiders to engage in transactions with sellers of large blocks of stock. Under these regulations, there is no reason to accord such sellers greater protection merely because multiple purchasers are involved in the sale. Accordingly, the Acting Director finds that the Roberts, Havlin and Pickrell purchases fall within the negotiated sale exception.

Respondent also argues that all of the transactions except for the Kemp sale[25] fall within the broker-dealer exception because J.C. Bradford, a broker or dealer registered with the Securities and Exchange Commission, was involved in the transactions.

To fall within this exception, the regulation requires the insider to purchase <u>from</u> the broker dealer.[26] As the ALJ found, J.C. Bradford's participation in the cited transactions was limited. It did not act as a market maker for Fidelity stock, did not set prices for Fidelity stock, played no role in the negotiations with any seller, received no commission from the participants, and did not purchase or sell any Fidelity stock during the relevant time period. J.C. Bradford's sole involvement was the ministerial act of transmitting stock certificates to Fidelity for reissuance -- an act performed solely as an accommodation to its customers.[27] Under these circumstances, the

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[25] Respondent does not argue that the Kemp sale fell within any exception.

[26] 12 C.F.R. § 563b.3(c)(9).

[27] Although Respondent claims that J.C. Bradford acted as a transfer agent for Fidelity stock, the record shows that Fidelity acted as its own transfer agent, issuing new stock certificates to

Acting Director cannot conclude that Respondent purchased from J.C. Bradford. The broker-dealer exception is inapplicable.[28]

Accordingly, the Acting Director finds that Swanson's participation in the Kemp and Juanita Swanson purchases violated 12 C.F.R. 563b.3(c)(9) and conditions imposed in writing by the agency in connection with the granting of the conversion application. A cease and desist order will be issued on this basis.

Enforcement sought an industry-wide prohibition order based on these violations. While the ALJ found that Respondent violated the conversion regulations and received a financial gain or other benefit from this misconduct, the ALJ concluded that Enforcement failed to demonstrate that Respondent demonstrated willful or continuing disregard for the safety and soundness of the institution.[29] The Acting Director is also unable to conclude that Respondent's violations reflected the requisite culpability. Evidence of scienter has not been identified.[30] Accordingly, a

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the various purchasers. Tr. Beavers at 61, Tr. Parker at 208, Tr. Rhodes at 481.

[28] Further, J.C. Bradford's involvement did not advance the regulatory purposes by curbing insider abuse. J.C. Bradford's involvement did not interpose the reasoned analysis of a investment professional between the insider and the seller to ensure a fair price and other conditions of sale. Indeed, in the only transaction involving J.C. Bradford that also fell outside the one percent negotiated sale exemption, Juanita Swanson received $2.50 per share below the price of a contemporaneous sale.

[29] RD at 40-41, 61-62. Personal dishonesty, the alternative culpability finding, was not involved in this violation.

[30] Some showing of knowledge of wrongdoing is required to establish culpability under either willful or continuing disregard standard. Oberstar v. FDIC, 987 F.2d 494, 502 (8th Cir. 1993); Brickner v. FDIC, 747 F.2d 1198, 1203 (8th Cir. 1984). Accord Kim v. OTS, No 93-70425, slip op. at 14450 (9th Cir. Nov. 25, 1994)(the

prohibition order will not be issued on the basis of these violations.

b. Control Act Violations

The Control Act provides that "[n]o person, acting directly or indirectly or through or in concert with one or more other persons, shall acquire control of any insured depository institution through a purchase, assignment, transfer, pledge or other disposition of voting stock . . . " unless the appropriate Federal banking regulatory agency has been given prior written notice and has not issued a notice disapproving the proposed acquisition.[31] "Control" under the Control Act includes the power, directly or indirectly, to direct the management or policies of an insured depository institution.[32]

The Director adopts the ALJ's conclusion that Respondent violated the Control Act from at least April 1986, until his resignation from Fidelity on May 6, 1991. In addition, the Acting Director finds that ALJ correctly determined that the Respondent violated FHLBB and OTS regulations implementing the Control Act at 12 U.S.C. Part 574 (1986-91).[33] Based on these violations, the

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agency must show a degree of culpability beyond mere negligence).

[31] 12 U.S.C. § 1817(j)(1)(Supp. II 1990). See 12 U.S.C. § 1730(q)(1982 & 1988).

[32] 12 U.S.C. § 1817(j)(8)(B)(Supp II. 1990) and 12 U.S.C. § 1730(q)(9)(B)(1982 & 1988).

[33] Under these regulations, Swanson and McDonald are presumed to have acted in concert because they provided credit to each other and were instrumental in obtaining financing for each other to purchase stock in Fidelity. 12 C.F.R. § 574.4(d)(3)(ii). Swanson and McDonald acquired presumptive control of Fidelity

Acting Director will issue a cease and desist order.[34]

Enforcement sought an industry-wide prohibition order against Respondent based on the Control Act violations. Again, the Acting Director is unable to find that the conduct of the Respondent evinced the requisite culpability to support the issuance of a prohibition order. The ALJ found that Swanson was aware of, and intended to comply with, a 10 percent limitation on stock ownership, that he did not realize that his concerted action with McDonald would result in the aggregation of their shares for the purposes of the control, and that Swanson's violations of the

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because they acquired more than 10 percent of a class of voting stock and were subject to one or more control factors. 12 C.F.R. § 574.4(b)(1)(i). These control factors reflect the fact that Swanson and McDonald were both members of Fidelity's Board of Directors (12 C.F.R. § 574.4(c)(7)) and that Swanson was the Chief Executive Officer and McDonald was Executive Vice President of Fidelity (12 C.F.R. § 574.4(c)(8)). None of these presumptions were rebutted. See 12 C.F.R. § 574.4(e).

[34] The statute permits the OTS to require Swanson to take affirmative action "to correct any conditions resulting from any violation or practice" with respect to which a cease and desist order is issued. 12 U.S.C. § 1818(b)(1) and (6)(Supp II. 1990) and 12 U.S.C. § 1464(d)(2)(a)(1982 & 1988). Pursuant to this authority, Enforcement requested that Swanson be required to divest his illegally acquired Fidelity stock.

The Acting Director believes that the affirmative action of stock divestiture is too severe a sanction under the circumstances of this case, and adopts the ALJ's recommendation for denial of this affirmative action. However, to ensure that Respondent does not acquire control of Fidelity through the acquisition of additional stock or through future actions in concert with McDonald, the Acting Director will impose affirmative limitations on Swanson's ability to acquire and vote Fidelity stock. These limitations are comparable to the conditions imposed in the OTS consent order with McDonald in In re McDonald, ATL-92-70 (July 27, 1992).

Control Act were unknowing, unintentional and inadvertent.[35] The record evidence does not support a different finding that Respondent's Control Act violations constituted willful or continuing disregard for the safety or soundness of the institution.

Further, although Respondent used nominees and misstatements in the institution records to conceal his stock ownership from his ex-wife and the courts in divorce proceedings, the Acting Director similarly cannot conclude that these acts of personal dishonesty support the issuance of a prohibition order based on the control violations. The statute requires a showing that a violation "involved" personal dishonesty.[36] There is no nexus between Respondent's deception and the control violations because the cited deceit neither disguised nor advanced the control violations.[37]

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[35] RD at 31, 34 and 35. The Acting Director rejects Enforcement's argument that this finding is not supported by credible evidence in the record. See Jt. Ex. 2B, Swanson Dep. at 9-10.

[36] Personal dishonesty encompasses a broad range of conduct including "disposition to lie, cheat[,] or defraud; untrustworthiness; lack of integrity[;] . . . misrepresentation of facts and deliberate deception by pretense and stealth[;] . . . [or] want of fairness and [straightforwardness]. Van Dyke v Board of Governors of the Federal Reserve Board, 876 F.2d 1377, 1379 (8th Cir. 1989). See In re Cousin, OTS AP No. 94-48, 39 (Oct. 11, 1994), appeal docketed, Cousin v. OTS, No 94-4206 (2d Cir., Nov. 25, 1994); In re Lopez, OTS AP No. 94-23, 37, n.67 (May 17, 1994), appeal docketed, Lopez v. OTS, No. 94-1449 (D.C. Cir., filed July 15, 1994).

[37] Respondent's deception involved the placement of his shares in the hands of the very person with whom he is presumed to act in concert -- a curious action if one is attempting to hide control violations based solely on aggregated holdings with that individual. Compare In re Rapp, OTS Order No. AP-92-148 (Dec. 4, 1992), appeal docketed, Rapp v. OTS, No. 93-9500 (10th Cir. Dec. 31, 1993) (Respondents attempted to place stock in the hands of business associates, employees and friends outside of the existing

Accordingly, a prohibition order will not be issued for the control violations. CMPs for these violations are discussed at Section III.B.

c. Inaccurate Records Violations

The ALJ found that Respondent violated regulations requiring the Association to establish and maintain accurate records. Because Swanson's stock was misleadingly registered in McDonald's name, Fidelity's stock register and other records falsely reflected that Swanson owned less stock than he actually owned and that McDonald owned more stock than he actually owned.[38] The Respondent did not except to these findings and the Acting Director will adopt them, with one modification. Stock registers reflect only stockholders of record and do not necessarily reflect all beneficial interests, such as where stock is held by a nominee. Since there is no evidence that Fidelity's register incorrectly recorded transfers, the ALJ's finding that Fidelity's stock register was inaccurate must be rejected. The Acting Director will, however, issue a cease and desist order based on inaccurate reporting of Respondent's own and McDonald's stock holdings contained in Fidelity's 1987-89 proxy statements, the 1987 stock offering statement and the 1991 management questionnaire. RD at 57-58.

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control group). Respondent's attempts to conceal his stock from his wife are considered with regard to other violations at Section III.A.2.c., below.

[38] RD at 60-61. 12 C.F.R. § 563.17-1(c) (1987-89) and 12 C.F.R. § 563.170(c) (1990-91) required the Association to "establish and maintain such accounting and other records as will provide an accurate and complete record of all [business that it transacts]. . . ."

Respondent's misuse of institution records for a personally dishonest objective fulfills the legal requirements for the issuance of an industry-wide prohibition order under the applicable statutes.[39] However, the Acting Director has determined not to issue an industry-wide prohibition order against the Respondent since the other sanctions imposed are sufficient in light of the facts of this particular case.

d. Improper Bonus Transaction

The Acting Director adopts the ALJ's determinations that: Swanson's concealment of $118,000 in bonuses caused Fidelity to violate 12 C.F.R. § 563.170(c)(1990);[40] and that Respondent knowingly made false and misleading statements to OTS examiners in violation of 12 C.F.R. § 563.180(b)(1)(1991).[41] The Acting Director will issue a cease and desist order for these violations.

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[39] See 12 U.S.C. § 1818(e)(1)(Supp. II 1990) and 12 U.S.C. § 1464(d)(4)(A)(1988).

[40] 12 C.F.R. § 563.170(c)(1990) requires the institution to maintain accurate records, and is set forth at III.A.2.c. above.

[41] 12 C.F.R. § 563.180(b)(1)(1991) states that no director or officer or other person participating in the conduct of the affairs of an association shall knowingly:

> [m]ake any written or oral statement to the Office or to an agent, representative or employee of the Office that is false or misleading with respect to any material fact or omits to state a material fact concerning any matter within the jurisdiction of the Office. . . .

Respondent's response to examiners falsely omitted the material fact that Swanson had actually taken $140,000 rather than $22,000 from the bonus pool.

In connection with the cease and desist order, the ALJ recommended denial of Enforcement's request for the affirmative action of restitution of $118,000 in unreported bonuses. The ALJ found that there was "no showing . . . that Respondent would not have received [the] $118,000 bonus notwithstanding the falsification." RD at 27. Enforcement excepts to the recommended denial of restitution arguing that the cited finding is erroneous based on Swanson's written admission to OTS examiners that his contributions did not justify a bonus greater than that reflected on Fidelity's books.

The Acting Director will adopt the ALJ's recommendation. The ALJ specifically considered the admission cited by Enforcement and concluded that the admission lacked veracity and was merely an excuse to explain the obvious decrease in his yearly bonus in furtherance of his scheme to defraud his ex-wife. RD at 27. The Acting Director does not believe that the record supports a different finding. Accordingly, the Acting Director will not order restitution.[42]

Enforcement seeks an industry-wide prohibition order based on the bonus transaction. Again, the Acting Director believes that the circumstances surrounding the bonus transaction are legally sufficient for a prohibition order, but decides as a matter of

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[42] The Acting Director, however, will clarify the Recommended Decision to the extent that it suggests that the absence of a loss to the institution precludes restitution. See RD at 27. A finding of a loss to the institution is not a predicate for an order of restitution. See In re Lopez at 43-44 and In re Simpson at 32-33 (Respondents required to repay benefits received as a result of the violation or practice, even though there was no quantified loss to the institution.) The requirements for an order of restitution are set forth in 12 U.S.C. § 1818(b)(6).

discretion not to issue such an order. Swanson's violation of agency regulations[43] and his fiduciary breaches[44] demonstrate that Swanson engaged in the requisite misconduct under 12 U.S.C. § 1818(e)(1). Swanson benefited from these actions, and his conduct would support conclusions of personal dishonesty and willful and continuing disregard for the safety and soundness of the institution.[45] The Acting Director is particularly concerned that thrift executives such as Respondent would make a misleading statement to an OTS examiner. Nevertheless, the Acting Director, in an exercise of his discretion, will not issue an industry-wide prohibition order. The cease and desist order and CMPs ordered today seem sufficient in light of the particular circumstances of this case.

B. Civil Money Penalties

In addition to cease and desist and prohibition orders, Enforcement sought CMPs for the Control Act violations. In re Rapp prescribes a five-step analysis to determine the appropriate penalty amount. The steps are: first, determination of the appropriate tier of the violation, practice or breach; second, selection of the starting daily dollar amount for computation of the penalty; third, determination of whether the violation is

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[43] 12 C.F.R. § 563.170(c)(1990) and 12 C.F.R. § 563.180(b)(1)(1991).

[44] See Jameson v. FDIC, 931 F.2d 290 (5th Cir. 1991) (officer's falsification of bank records to conceal bonus breaches his fiduciary duty to the institution).

[45] See In re Jameson, Docket No. FDIC-89-83e, 1991 FDIC Enf. Dec. (P-H) para. 5154A at A-1542.6, aff'd, Jameson v FDIC, 931 F.2d 290 (5th Cir. 1991).

"continuing;" fourth, application of the Federal Financial Institutions Examination Counsel ("FFIEC" factors");[46] and fifth, application of the statutory mitigating factors. The Acting Director conducts this analysis de novo.[47]

1. Determination of the Tier.

The pre-FIRREA Control Act uses one tier for all violations. A predicate for the imposition of CMPs under the pre-FIRREA Control Act, however, is a finding that the Control Act violations were "willful."[48] The ALJ concluded the Respondent's conduct was not willful and recommended no CMPs for pre-FIRREA conduct. The Acting Director adopts this conclusion.[49]

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[46] Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 45 Fed. Reg. 59423 (1980).

[47] In re Rapp at 20-70 and In re Paul, OTS Order No. 93-104, 31-71 (Dec. 15, 1993) contain a complete explanation of the CMP analysis.

[48] 12 U.S.C. § 1730(q)(17)(1982), redesignated at 12 U.S.C. § 1730(q)(18)(Supp. IV. 1986 & 1988).

[49] Enforcement excepts to the ALJ's finding that Swanson's Control Act violations were not willful. Willfulness, as used in the Control Act, means knowing or reckless disregard for whether the conduct is illegal. In re Lopez at 57, n.103, citing United States v. Illinois Central R. Co., 303 U.S. 239, 243 (1938). See also Miller v. FDIC, 906 F.2d 972, 974-75 (4th Cir. 1990) (knowledge that a purchase violates the Control Act is sufficient to support CMPs for pre-FIRREA Control Act violations); FDIC v. D'Annunzio, 524 F.Supp. 694, 699, 701 (N.D.W.Va. 1981)(CMPs under Control Act require willful action in blatant disregard of the law with a view of evading or avoiding its prohibitions). In light of the factual finding that Respondent's Control Act violations were "unknowing and inadvertent," the Acting Director cannot conclude that Respondent's pre-FIRREA violations were willful under this standard.

The current post-FIRREA Control Act contains three penalty tiers.[50] Enforcement requested, and the ALJ recommended, penalties based on the lowest possible penalty tier. This tier permits maximum daily penalties of $5,000 based solely on a showing that the Control Act was violated. The Acting Director will assess CMPs for post-FIRREA conduct within this statutory daily maximum.

2. Selection of the Starting Amount.

The starting amount is generally "the amount [of] the loss or risk of loss to the institution, or personal gain to the respondent, if either is present." Where, as here, a respondent does not receive a quantifiable gain and the institution did not suffer a quantifiable loss from violations, In re Rapp recommends a starting amount equal to one-half of the amount of the statutory maximum penalty for the violation.[51] Based on this standard, the starting amount is $2,500 per day for the post-FIRREA violations.

3. Continuing violations.

The OTS uses an objective approach to determine whether a violation is continuing. This test is whether: (a) the detrimental effect of the violation continued; and (b) the effect could have been undone or cured by the respondent taking or refraining from a particular action.[52] Respondent's violations satisfy this test because the risk to Fidelity from Swanson's illegal control existed

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50 12 U.S.C. § 1817(j)(16)(Supp. II 1990).

51 In re Rapp at 41-42.

52 In re Rapp at 42-43; In re Paul at 40-41.

every day of his control, and because the Respondent could have eliminated these risks at any time by terminating his control.[53]

Even though this objective test is met, the decisionmaker may, nonetheless, decline to assess the penalty on a continuing basis at the selected starting amount. In so doing, the decisionmaker may consider whether the Respondent continued the violation intentionally or despite warnings.

The ALJ recommended a daily starting amount of $2,500 for each day that the Respondent made a purchase in violation of the Control Act, and $50 for all other days that the violation continued. Enforcement and Respondent except to the $50 daily figure, arguing in favor of $100 and $10 daily amounts respectively. The Acting Director, however, believes that the starting amount set by the ALJ appropriately balanced the culpability of Respondent's conduct with the potential risks posed by this long-standing violation of the Control Act. Using the ALJ's $50 daily figure, the penalty assessed on a continuing basis, before application of the FFIEC factors, is $34,300.[54]

4. Application of the FFIEC Factors.

The FFIEC statement recites thirteen aggravating and

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[53] In re Lopez at 59-60; In re Rapp at 52, n.57. See United States v. ITT Continental Banking Co., 420 U.S. 223 (1975).

[54] This was computed as follows:

636 days times $50 (August 9, 1989 through May 6, 1991)	$31,800
One violation at $2,500 Starting Amount	2,500
	$34,300

mitigating factors that the OTS applies to the starting amount to determine the appropriate penalty. The Acting Director agrees, for the reasons stated in the Recommended Decision, that the penalty should be increased by a total of 20 percent for the FFIEC factors of cooperation (5 percent), gain or benefit to the Respondent (5 percent) and unsafe or unsound practices or breaches of fiduciary duty (10 percent).[55] The Acting Director finds that seven FFIEC factors are inapplicable or warrant no increase or decrease.[56] The Acting Director does not adopt the ALJ's recommendations regarding the following three FFIEC factors:

Concealment. Under this FFIEC factor, the OTS considers whether the respondent concealed or voluntary disclosed the violation. The ALJ recommended a 10 percent increase for this factor because:

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[55] The ALJ's discussion of the FFIEC factor, unsafe or unsound practices or breaches of fiduciary duty, warrants some supplementation. Under this factor, the agency considers whether a violation had a "[t]endency to create unsafe or unsound banking practices or breaches of fiduciary duty." In addition to the ALJ's discussion of this point, the Acting Director notes that Swanson's Control Act violations precluded the OTS from reviewing his competence, experience and integrity in connection with a change of control notice. Swanson's deficiencies in these areas underlie each subsequent fiduciary breach and regulatory violation, including the bonus transaction and the concealment of stock ownership. Accordingly, a 10 percent increase for this factor is appropriate.

[56] The ALJ concluded, and the Acting Director agrees, that three FFIEC factors, willfulness, frequency or recurrence, and continuation of the violation, warrant no increase, and that two other FFIEC factors, restitution and existence of a compliance program, are inapplicable. The ALJ did not address the FFIEC factors of preventative measures and previous criticism. This omission is insignificant since these factors are also inapplicable.

> Concealment played an important part in Respondent's conduct in [the Control Act violations], and included his fraudulent deception of the various stock acquisitions for the purpose of misleading others as to the true value of his personal assets.

RD at 36. Swanson excepts to this increase.

The factor of concealment concerns communications between the regulator and an institution.[57] In light of the conclusion that Swanson was unaware that his actions violated the Control Act, the Acting Director cannot say that Swanson undertook active efforts to conceal these violations from the agency. However, Respondent's failure to disclose the extent of his beneficial ownership interests in stock in the 1991 management questionnaire impaired the regulator's access to information on control issues. Accordingly, the penalty will be increased by 5 percent (rather than the recommended 10 percent).

Harm to the institution. Under this factor, the agency will consider any threat or actual loss or other harm to the institution, including harm to the public confidence in the institution, and the degree of any such harm. Here, the ALJ recommended an increase of 5 percent based on Respondent's "serious compromise of the institution's records." While no party excepts to this finding, the Acting Director will, nonetheless, reduce the CMP for this factor.

Although the ALJ correctly concluded that Swanson's actions injured the institution, none of the identified injuries affected

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[57] See In re Rapp at 45.

Fidelity's capital or earnings or otherwise injured the institution in a way that has been quantified in the record. Some reduction is therefore appropriate in this case.[58] While the identified injuries -- the compromise of the institution's books and records and of its compensation system -- preclude a full 75 percent mitigation, the Acting Director believes that a reduction of 25 percent is appropriate.[59]

Prior violations. Under this factor, the OTS will consider the history of prior violations, particularly where similarities exist between those violations and the violation under consideration. An increased penalty may be imposed where a respondent has a history of violations before the current one. A first time offender may merit a reduced penalty. The ALJ recommended a decrease of ten percent for this factor because "virtually all of Respondent's service . . . appears genuinely motivated by concern for the institution." RD at 37. Enforcement excepts and urges a decrease of five percent.

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[58] See In re Rapp at 56.

[59] In re Rapp and In re Lopez are instructive. Both cases involved control violations that occurred over an extended period of time, the use of nominees to hold beneficial stock interests, and the concealment of beneficial stock interests through the falsification of books and records of the institution (In re Lopez) or by misleading statements to regulators and others (In re Rapp). Because there was no identifiable harm to the institution and no demonstrated affect on the capital or the earnings of the institution, the Director reduced the penalty in In re Rapp by the full 75 percent. By contrast, in In re Lopez, CMPs were increased by 25 percent because the respondents' illegal control facilitated their ability to engage in wide-ranging misconduct that caused substantial quantified losses that contributed to the deterioration of capital and ultimately to the institution's receivership. In this case, the Acting Director believes a reduction of 25 percent (rather than a greater amount) is appropriate since the ALJ recognized that the records of the institution had been compromised and since neither party raised an objection regarding this finding.

This factor is intended to take into account a respondent's ability to comply with related regulatory and statutory requirements, not simply his motivation for action. Here, Swanson engaged in violations of the conversion regulations prior to his violation of the Control Act. The conversion regulations, like the Control Act requirements, impose certain restrictions on Respondent's ability to acquire Fidelity's stock. Accordingly, the Acting Director will not reduce the penalty by the full 10 percent permitted by this factor, but will decrease the penalty by 5 percent, as suggested by Enforcement.

5. Statutory Mitigating Factors.

The agency must also take into account five statutory mitigating factors.[60] Because the FFIEC factors address the statutory factors of "gravity of the violation" and "history of previous violations," no further consideration of these factors is required. Two other statutory factors, "good faith" and "such other factors as justice may require," warrant no increase or decrease to the CMPs.[61] The fifth factor, Respondent's financial

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[60] See 12 U.S.C. § 1817(j)(16)(Supp. II 1990)(incorporating the mitigating factors in 12 U.S.C. § 1818(i)(2)(G)(Supp. II 1990).

[61] In his post-hearing brief, the Respondent argued that CMPs should be reduced to reflect his good faith. Respondent did not, however, identify evidence in support of mitigation. While the ALJ did not address good faith as a mitigating factor, he did reach certain conclusions touching on Respondent's good faith. The ALJ found, for example, that Respondent at all times intended to comply with the Control Act.

Other record evidence, however, belies some of the conclusions reached by the ALJ regarding Respondent's good faith. Specifically, Respondent's indifference to the accuracy of Fidelity's books and records and his effort to mislead another tribunal and his wife do not warrant any finding of good faith.

resources, is discussed below.

6. Calculation.

Based on the above discussion, the starting amount of $34,300 will be increased by 25 percent to $42,875 to reflect the aggravating factors. In accordance with the staged, sequential mitigation described in In re Paul at 52-53, the Acting Director will reduce this amount by 25 percent to $32,156.25 to reflect the absence of significant quantifiable harm to the institution from the violation. This amount will then be reduced by an additional 5 percent to $30,548.44 to reflect relevant prior violations.

7. Financial Resources.

The final stage of the calculation is the consideration of the size of financial resources of the Respondent.[62] The initial burden is on Enforcement to produce some evidence on this point.[63] If that burden is met, the Respondent has the burden of demonstrating that he lacks the financial resources to pay the

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Accordingly, the Acting Director concludes that the evidence does not justify any modification of the CMP amount.

[62] There is no limit on the degree to which a limited capacity to pay may reduce the penalty amount. If a penalty exceeds a respondent's ability it will be reduced to a level that can be paid. In re Rapp at 50.

[63] The burden of proof is governed by 5 U.S.C. 556(d) which states that "the proponent of a rule or order has the burden of proof." Burden of proof refers to the burden of going forward with evidence, not the ultimate burden of persuasion. See Dazzio v. FDIC, 970 F.2d 71 (5th Cir. 1992); Stanley v. Board of Governors of the Federal Reserve System, 940 F.2d 267 (7th Cir. 1991); Bullion v. FDIC, 881 F.2d 1368 (5th Cir. 1989); In re Rapp at 50-51, n.55; In re Paul at 64, n.52.

assessed penalty.

Enforcement met its burden by introducing evidence that Swanson is currently employed as President of Coronet Industries, with a salary in excess of $50,000, and that he owns, legally or beneficially, 60,492 shares of Fidelity with a value from $1.09 to $1.33 million. Respondent has offered no evidence regarding his ability to pay. The Acting Director therefore concludes that there is no reason to reduce the penalty amount by reason of a limited ability to pay.

V. CONCLUSION

For the reasons set forth above, the Acting Director will issue: (1) An order directing Respondent to cease and desist from statutory violations, regulatory violations, and violations of conditions imposed in writing; and (2) An order directing Swanson to pay CMPs of $30,548.44.

O R D E R

Upon consideration of the entire record in this matter, including the Recommended Decision of the Administrative Law Judge and the exceptions to the Recommended Decision filed by Enforcement Counsel and by Respondent Swanson, and Enforcement Counsel's reply to Respondent's exceptions, and for the reasons set forth in the accompanying Decision:

The Acting Director, pursuant to his authority under 12 U.S.C. § 1818(b)(Supp. II 1990) and 12 U.S.C. § 1464(d)(2)(A)(1982-1988) finds that: Lawrence A. Swanson, in his former capacity of Chief Executive Officer and Director of Fidelity Federal Savings Bank was an institution-affiliated party of Fidelity and a person participating in the conduct of the affairs of Fidelity who violated laws and regulations including: 12 U.S.C. § 1730(q)(1982 & 1988), 12 U.S.C. § 1817(j)(Supp. II 1990), 12 C.F.R. § 563.17-1(c)(1987-89), 12 C.F.R. § 563.170(c)(1990-91), 12 C.F.R. § 563.180(b)(1)(1991), 12 C.F.R. § 563b.3(c)(9) and 12 C.F.R. Part 574 (1986-1991), and violated a condition imposed in writing by the FHLBB in connection with the granting of Fidelity's mutual-to-stock conversion application.

The Acting Director finds that Respondent violated the Control Act, 12 U.S.C. § 1730(q)(1982-88), the amended Control Act, 12 U.S.C. § 1817 (1989) and implementing regulations at 12 C.F.R. Part 574 (1986-91). The Acting Director is authorized to impose civil money penalties for violations of the amended Control Act under 12 U.S.C. § 1817(j)(17)(Supp. II 1990). After consideration of factors in aggravation and in mitigation of Respondent's conduct, as fully set forth in the accompanying Decision, civil money penalties are imposed in the amount of $30,548.44.

IT IS, THEREFORE, HEREBY ORDERED that:

1. Respondent shall cease and desist from engaging in any acts, omissions, or practices involving violations of law or regulations, or conditions imposed in writing by the Office of Thrift Supervision or Federal Home Loan Bank Board in connection with the granting of any application or other request by a depository institution.

2. Respondent shall not purchase any stock in Fidelity Federal Savings Bank.

3. Respondent shall not sell any Fidelity stock to John Frank McDonald, solicit proxies from or grant proxies to McDonald, nor agree, directly or indirectly, with McDonald on how to vote Fidelity stock regarding any matter coming before Fidelity stockholders.

4. For a period of five years from the effective date of this Order, Respondent shall not vote Fidelity stock for the election or termination of directors at Fidelity, or with regard to any matter concerning officers or employees of Fidelity.

5. Paragraphs 1 through 4 of this Order are effective upon the expiration of thirty (30) days after the date of service of this Order upon Respondent and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order shall have been stayed, modified, terminated or set aside by action of the Director or a reviewing court.

IT IS FURTHER ORDERED that:

6. After consideration of factors in aggravation and in mitigation of Respondent's conduct, as fully set forth in the accompanying Decision, Respondent shall pay civil money penalties of $30,548.44.

7. Respondent shall make full payment of the civil money penalties assessed herein within sixty days after the date of service of this Order upon Respondent. Remittance of these penalties shall be payable to the Treasurer of the United States and delivered to:

Controllers' Division
Office of Thrift Supervision
U.S. Treasury Department
1700 G Street, N.W.
Washington, D.C. 20552

8. The provisions of paragraphs 6 and 7 of this Order are effective immediately upon service upon Respondent and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order shall have been stayed, modified, terminated or set aside by action of the Director or a reviewing court, or in accordance with any applicable statute or regulation.

IT IS FURTHER ORDERED that:

9. Respondent is hereby notified that he has the right to appeal this Final Decision and Order to the United States Court of Appeals within 30 days after the date of service of such Final

Decision and Order. 12 U.S.C. § 1818(h).

THE OFFICE OF THRIFT SUPERVISION

Dated: January 24, 1995 By: Jonathan L. Fiechter

Jonathan L. Fiechter
Acting Director

APPENDIX A

CUMULATIVE & PERCENTAGE STOCK OWNERSHIP FOR SWANSON AND MCDONALD

Date of Stock Transaction	Total Outstanding Shares	LAS Stock Reg Cumulative Shares	LAS Shares Owned Legally & Beneficially (Cumulative)	LAS Shares Owned Legally & Beneficially (Percentage)	FMD Stock Reg Cumulative Shares	FMD Shares Owned Legally & Beneficially (Cumulative)	FMD Shares Owned Legally & Beneficially (Percentage)	Combined Percentage of Outstanding
Oct. 14, 1983 (orig. issue)	98,600	2,720	2,720	2.76%	2,720	2,720	2.76%	5.52%
Dec. 16, 1983	98,600	2,720	2,720	2.76%	4,830	4,830	4.90%	7.66%
Dec. 27, 1984	98,600	2,920	2,920	2.96%	5,030	5,030	5.10%	8.06%
March 20, 1985 (1)	98,600	3,880	3,880	**3.94%**	5,990	5,990	**6.08%**	**10.01%**
March 27, 1985	98,600	4,175	4,175	4.23%	6,285	6,285	6.37%	10.61%
Oct. 21, 1985	98,600	4,375	4,375	4.44%	6,810	6,810	6.91%	11.34%
April 3, 1986	98,600	6,715	6,715	6.81%	7,035	7,035	7.13%	13.95%
April 18, 1986 (2)	98,600	6,715	6,915	7.01%	7,435	7,235	7.34%	14.35%
May 9, 1986 (split 3/1)	295,800	20,145	20,745	7.01%	22,305	21,705	7.34%	14.35%
Feb. 19, 1987	295,800	20,145	21,146	7.15%	23,106	22,105	7.47%	14.62%
Nov. 27, 1987	295,800	20,145	21,871	7.39%	24,556	22,830	7.72%	15.11%
April 7, 1988	295,800	20,145	22,018	7.44%	24,850	22,977	7.77%	15.21%
May 2, 1988	295,800	20,145	22,485	7.60%	25,784	23,444	7.93%	15.53%
June 16, 1989	295,800	20,145	22,768	7.70%	26,350	23,727	8.02%	15.72%
July 10, 1989 (3)	295,800	20,145	23,768	**8.04%**	28,350	24,727	**8.36%**	**16.39%**
Sept. 29, 1989	295,800	20,145	22,768	7.70%	26,350	23,727	8.02%	15.72%
Dec. 14, 1989	295,800	20,145	23,268	7.87%	27,350	24,227	8.19%	16.06%
April 1, 1990 (split 3/1)	887,400	60,435	69,804	7.87%	82,050	72,681	8.19%	16.06%
May 30, 1990	887,400	60,735	70,104	7.90%	82,050	72,681	8.19%	16.09%
June 28, 1990	887,400	60,735	70,104	7.90%	82,338	72,969	8.22%	16.12%
July 16, 1990	887,400	60,735	70,104	7.90%	82,321	72,952	8.22%	16.12%
Oct. 30, 1990	887,400	60,735	70,104	7.90%	82,321	72,952	8.22%	16.12%
Dec. 24, 1990	887,400	60,435	69,804	7.87%	82,321	72,952	8.22%	16.09%
April 26, 1991	887,400	60,492	66,604	7.51%	79,064	72,952	8.22%	15.73%

(1) Combined Percentage Outstanding for McDonald and Swanson Exceeds 10%.
(2) Beginning Double Stock Purchases by McDonald.
(3) Highest Combined Percentage Outstanding for McDonald and Swanson.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 1995, a copy of the foregoing OTS Order No. AP 95-05 was served by hand delivery and Federal Express Mail on the following:

By Hand Delivery

Abbe David Lowell, Esq.
William M. Hathaway, Esq.
Meredith G. Moore, Esq.
Brand and Lowell
923 Fifteenth Street, N. W.
Washington, D. C. 20005

By Federal Express Mail

Lance D. Cassak, Esq.
Office of Thrift Supervision
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Office of Thrift Supervision
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Melba McCannon

Melba McCannon For the Secretary
Office of Thrift Supervision